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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL DE JESUS ROSAS,

Defendant and Appellant.

H038879

(Santa Cruz County

Super. Ct. No. WF00933)

**I. INTRODUCTION**

This case is before us for a second time, after remand from the California Supreme Court for reconsideration in light of that court's recent opinion in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).

Defendant Manuel de Jesus Rosas appeals after a jury convicted him of premeditated and deliberate first degree murder (Pen. Code, § 187, subd. (a)<sup>1</sup>; count 1), attempted murder (§§ 664/187, subd. (a); count 2), and participation in a criminal street gang (§ 186.22, subd. (a); count 3), with findings that the murder and attempted murder were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The jury also found that in the commission of the murder and attempted murder, defendant

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

and/or a principal personally and intentionally discharged a firearm that caused great bodily injury or death (§ 12022.53, subds. (d), (e)(1)). The trial court sentenced defendant to a prison term of 94 years 8 months to life.

On appeal, defendant contends the trial court erred by permitting gang experts to testify that Marco Lopez, a non-testifying gang member, said that defendant admitted that he was the shooter and that the shooting was part of a gang war. Defendant claims the gang expert testimony violated his Sixth Amendment right of confrontation as well as state evidentiary rules, including Evidence Code section 352. Defendant also contends the trial court erred by permitting the gang experts to offer opinions based on facts the experts themselves introduced. Additionally, defendant contends the trial court erred by admitting an out-of-court identification of defendant by the attempted murder victim. Finally, defendant contends the trial court erred by denying his motion for a mistrial after the jury accidentally viewed a video depicting the murder victim's dead body.

In supplemental briefing submitted after *Sanchez*, the Attorney General concedes that the trial court erred by allowing the gang experts to testify about the statements made by a non-testifying gang member, but she argues that the error was harmless. We agree that there was error and find that under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), the error was prejudicial as to the jury's verdicts as to the substantive offenses, the gang allegation, and the allegations that defendant or a principal personally and intentionally discharged a firearm that caused great bodily injury or death, because we cannot find, on this record, that "the guilty verdict actually rendered . . . was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 (*Sullivan*).) We will therefore reverse the judgment.

## **II. BACKGROUND**

On May 13, 2005, Wayne Minten and Dante Austin were shot on Palm Avenue in Watsonville. Minten died; Austin survived. Austin saw the shots fired from a burgundy

GMC Yukon, and he believed the driver had fired the shots. Other witnesses also saw a burgundy sports utility vehicle (SUV), like the one defendant often drove, around the scene and time of the shooting. The prosecution's theory was that defendant was driving the Yukon and that he shot Minten and Austin by reaching over the passenger's seat and firing out the front passenger window. The prosecution alternatively argued that even if defendant was not the shooter, he had been the driver and was guilty of the charges based on an aiding and abetting theory.

***A. Defendant's Prior Arrest in a Burgundy Yukon***

About three months before the Minten/Austin shooting, on February 23, 2005, Officer Eric Montalbo contacted defendant, who was sitting in the driver's seat of a burgundy Yukon. Officer Montalbo had seen defendant driving the burgundy Yukon on four or five prior occasions. A loaded .38 Special revolver was on the front passenger seat of the vehicle.

Based on prior contacts with defendant, Officer Montalbo believed defendant was involved with a Norteño gang. Officer Montalbo recognized defendant's three rear passengers as members of the City Hall Watsonville subset of the Norteño gang. Officer Montalbo observed several tattoos on defendant: "City Hall Soldier" on his neck, "X4" on his neck, and four dots on his left hand. Officer Montalbo did not see a teardrop tattoo on defendant's face at that time.

Defendant was later charged with carrying a firearm in a vehicle in violation of former section 12025. He was released from custody after a \$5,000 bail bond was posted by a family friend.

***B. The Shooting of Minten and Austin***

In May of 2005, Austin was living on Palm Avenue in Watsonville with Damien Duron and her son, Minten. Austin was 17 years old and Minten was 18 years old. Minten had been hanging out with people who appeared to be in the gang lifestyle, and he told Austin that he needed to "watch out" for City Hall Watsonville. Austin had

participated in some gang activities with Minten: throwing gang signs, getting into fights, and selling marijuana. According to Luis Juarez, one of Minten's best friends, Minten was not actually involved in a gang. Minten's mother, Duron, also did not think Minten or most of his friends were involved in gangs.

On May 13, 2005, Austin and Minten hung out with some of Minten's friends at a school near their house. Austin began walking home, with Minten riding a bike next to him. On several occasions over the previous few weeks, Austin had noticed a burgundy Yukon with tinted rear windows. He saw the burgundy Yukon again as he and Minten were on their way home from the school. The Yukon then turned around. Austin got a weird feeling, so he watched the Yukon and looked inside. The Yukon was traveling only about five miles per hour or slower.

Austin could clearly see the Yukon's driver, who looked straight at him. The driver was heavysset, with thick eyebrows or tattoos over his eyebrows, and a little bit of facial hair—possibly a light mustache. The driver had short hair and wore a red shirt.

After the Yukon turned around, it pulled up beside Minten. Austin saw the barrel of a gun come out of, or up to, the front passenger window. He then saw the gun pulled back inside the vehicle. Someone said, "What, what, what's up mother---." He then heard two shots, which were fired from inside the car. Austin ran towards Minten but was shot at himself, so he dove to the ground.

Austin believed that the person driving the Yukon was the shooter. Austin saw the front passenger of the car holding a big gun after the shots were fired, but he did not think that the front passenger had actually fired the gun. The front passenger was skinny, with short hair, normal eyebrows, a white shirt, and a tattoo on his arm. He looked like someone named Gabe, with whom Austin had fought the previous week.

Police responded to the scene of the shooting—located at 505 Palm Avenue—at about 8:30 p.m. Officer Steven Nakamoto arrived first. He attended to Minten, who was lying on the sidewalk and who was later pronounced dead at the scene. Another officer

arrived and attended to Austin, who was lying on the grass and complaining of pain in his groin.

When an officer asked Austin, “who did this to you,” Austin replied, “I don’t know.” Austin did not fully answer questions from the police because he was afraid he might be killed for cooperating, but he did describe the burgundy SUV. Austin told the police that Gabe, the person he had previously fought with, could have been in the car. He also told the police that Michael Harrington was involved, although he later testified that Harrington only resembled the driver.

Bullets were recovered from the sidewalk near Minten’s body, the gutter in front of 505 Palm Avenue, and the front porch of 505 Palm Avenue. Bullet fragments were found in the area as well, but no casings were found. The bullets were .380 caliber full metal jacket, and they were all fired from the same gun – likely, a semiautomatic handgun rather than a revolver.

***C. Witness Testimony about Seeing a Burgundy SUV on May 13, 2005***

Nancy Gutierrez Fernandez was on her back porch when she saw a burgundy SUV speeding down the alley next to her house. The vehicle headed east on Palm Avenue. About a minute later, she heard gunshots. She then saw the vehicle speeding away.

Julio Mendez and his girlfriend were driving on Palm Avenue. While stopped at a stop sign, they heard a sound like firecrackers. They continued driving, then saw a vehicle coming towards them, fast. They continued driving until they saw a person laying face-down on the sidewalk. At that point, Mendez stopped the car and called 911. Mendez thought that the vehicle was a Yukon or a Suburban. He initially thought that the vehicle was tan or gray, because of the lighting, but he later described it as red.

Sylvia Mendez was outside her home on Hill Street near the intersection with Palm Avenue. She heard screeching tires and turned towards the intersection, where she saw a burgundy SUV driving by “really fast.” She heard sirens three or four minutes later.

Janet Rackley lived on the 400 block of Palm Avenue. She heard gunshots from inside her house and heard a vehicle accelerating. She went to a window and saw what appeared to be an SUV driving fast.

Dennis Maitoza, his son, and a friend were at an intersection around Palm Avenue. Maitoza called 911 after seeing the SUV speeding and nearly colliding with his car. He reported that one of the vehicle's brake lights was out.

Maitoza's son, then 13 years old, reported that a burgundy SUV cut them off. The SUV "kind of skidded out, swerved," and went down Palm Avenue. Shortly afterwards, he heard a sound like firecrackers. He then heard the revving of an engine and saw the same burgundy SUV come down California Street. The SUV stopped at an intersection and turned right.

Jacqueline Ramirez (formerly Hernandez) lived on Hill Street at the intersection with Palm Avenue. She was friends with defendant's sister, Carmen Rosas,<sup>2</sup> and she knew that defendant and Carmen both drove a burgundy SUV. Ramirez saw "the SUV" driving recklessly on her street. The vehicle came from Palm Avenue and turned onto Hill Street, where it almost hit her mother's car. She saw "a couple of guys" in the vehicle but could not see any of their faces. Both the driver and front passenger were Hispanic males, and there were two Hispanic males in the back. The front windows were rolled down, and Ramirez thought she recognized defendant in the driver's seat. The driver was dark-skinned and "kind of bald," like defendant. She later told police she thought defendant could have been the front passenger. Ramirez called Carmen, saying she'd seen the Rosas's SUV driving by. Carmen told her that the SUV was at the Rosas's house and that she had just dropped defendant off at the cemetery, but Ramirez did not believe her.

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<sup>2</sup> Since defendant and his sister have the same surname, we will refer to Carmen Rosas by her first name for purposes of clarity and not out of disrespect.

Some time after the shooting, Kathryn Walters contacted the police because she had seen a vehicle that matched the description of the one involved in the shooting. Walters saw the vehicle “going in the out” of a bank parking lot near the farmer’s market. There were two people in the car. Walters was closer to the passenger than the driver. Walters was later shown a photo lineup that included defendant’s photo. Walters identified two people as looking similar to the driver, but she did not select defendant. Walters also identified a photograph of the passenger, but the photo was one that had been placed in the lineup randomly.

***D. Impounding of the Yukon and Search of Defendant’s Home***

After hearing that a burgundy SUV was possibly involved in the Minten homicide, Officer Montalbo believed the vehicle description was consistent with defendant’s vehicle. Officer Montalbo did not know of any other Watsonville gang member who drove a burgundy Yukon. Police put out a “BOL” (be on the lookout) for defendant’s vehicle.

Two days after the shooting, on May 15, 2005, Officer William Morales stopped a burgundy GMC Yukon being driven by defendant’s sister, Carmen. A rear taillight of the vehicle was out. Officer Morales issued a citation, then had the vehicle towed to the police department.

Nancy Gutierrez Fernandez viewed the Yukon at the police department. It looked like the vehicle she had seen on the night of the shooting, but she could not be sure. Julio Mendez also could not be sure it was the same vehicle. Mendez worried that if he identified a vehicle, he would get into trouble. He “didn’t want to be involved” in the case out of concern about gangs. Mendez believed that Minten’s friends were Norteños.

Sylvia Mendez saw the vehicle at the police department; it was similar to or the same one that she had seen on the night of the shooting. When Dennis Maitoza saw the Yukon at the police department a few days after the shooting, he said he recognized it. His son said that the Yukon was similar to the vehicle he had seen.

Jacqueline Ramirez identified the Yukon at the police station as the same one she had seen on the night of the shooting.<sup>3</sup>

During a search of the Yukon, police found defendant's driver's license, paperwork showing defendant's appointments for tattoo removal, and a receipt for the purchase of a bag of ice from a Watsonville supermarket at about 4:00 p.m. on May 13, 2005. There was a flat tire in the rear cargo space of the Yukon.

Gunshot residue testing was performed on the Yukon, which appeared to have been recently cleaned. Gunshot residue particles were found in the area under the front passenger window, on the front console, in the rear right passenger door area, and in the headliner of the middle seat. The presence of gunshot residue in these areas indicated that a firearm was discharged inside the vehicle or into the vehicle. Firing a gun from the driver's seat through the front passenger window would leave gunshot residue and bullet casings in the vehicle.

Defendant's home was searched on May 20, 2005. In his bedroom, police found gang indicia as well as a receipt for ammunition, which was dated May 10, 2005 – three days before the shooting. The receipt showed the purchase of three types of ammunition: 357 ammunition, .32 ammunition, and .38 Special ammunition for a revolver. The gang indicia included a photograph of people throwing gang signs and a photograph of defendant throwing a gang sign.

#### ***E. Defendant's Flight***

After the Yukon was impounded on May 15, 2005, Carmen told defendant that the police wanted to speak with him. Within a few days, defendant left. Defendant's

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<sup>3</sup> At trial, Ramirez testified that the Rosas's SUV had a soccer ball or baseball sticker on the passenger side or on the back window. However, there was no such sticker on the car she viewed. According to Officer Monica Herrera Gonzalez, Ramirez did not refer to a sticker, but to an area of dust left by the rear windshield wiper. She attributed Ramirez's trial testimony to a mistake in the transcript of her interview at the police station, in which she said "clean space" or "open space," not "baseball."

mother, Lillian Zequeira, did not hear from him until about a month later, when he called from Mexico. Defendant thereafter worked in Wisconsin and South Carolina.

In January of 2006, an employee of the bail bond company tried to find defendant. The employee went to defendant's last known address. Defendant's mother said defendant had not been home since he was wanted for questioning as a murder suspect. She believed he was in Mexico.

In September of 2009, police learned that defendant was in custody in South Carolina, and they arrested him there. Police had documented defendant's gang tattoos in 2004; they included "Watson Locos" above his eyes and "X4" on his neck. By the time of his arrest in 2009, defendant had new gang tattoos, including a teardrop near his left eye. The most common meaning of a teardrop tattoo is "that you've killed somebody." A teardrop tattoo can also symbolize a person's first stint in prison or the loss of a family member, although typically those teardrops would just be outlined, not filled in.

***F. Testimony of Defendant's Mother and Sister***

Zequeira, defendant's mother, testified under a grant of immunity. In May of 2005, she had three vehicles: a blue van, the burgundy Yukon, and a white Nissan. She, defendant, and Carmen all drove the Yukon. However, after defendant's arrest in February of 2005, defendant hardly ever drove the Yukon, because the police would stop him.

On the afternoon of May 13, 2005, Zequeira left for work at about 1 p.m. and Carmen left for work in the morning. Defendant was at home during the day, taking care of the children.<sup>4</sup> Zequeira worked at the farmer's market until about 7:30 p.m. Carmen arrived to work with Zequeira at about 3:00 p.m. Zequeira drove the blue van, and Carmen drove the Nissan.

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<sup>4</sup> The children included Carmen's one-year-old son and defendant and Carmen's half siblings, who ranged in age from three to nine.

Zequeira arrived home at about 7:30 p.m. According to Zequeira, the Yukon was in the garage. Zequeira went upstairs until about 8:30 p.m. When Zequeira came downstairs, she heard Carmen answer the telephone and say that she had just taken defendant to the cemetery.

Carmen arrived home at about 7:15 p.m. Carmen testified that she later drove defendant to the cemetery in the Nissan. Defendant's closest friend, Isaac Guzman, had been murdered in December of 2004, and defendant went to his grave nearly every day. However, when interviewed by the police, Carmen had claimed to have been driving the Yukon on the night of the shooting. She claimed she had been at Target from 8:00 p.m. to 9:00 p.m. After officers told Carmen that they would obtain surveillance video from Target, Carmen admitted she had not gone to Target; she had given defendant a ride to the cemetery between 8:00 p.m. and 9:00 p.m.

According to Zequeira, they cleaned the Yukon on a weekly basis at the car wash. According to Carmen, in 2005, defendant's tattoos included a teardrop. He was not involved in gangs at that time and was having his tattoos removed. He did remain friends with gang members, however.

***G. Identification of Defendant by Austin***

After learning that defendant drove a vehicle similar to the one seen around the time of the shooting, Officer Monica Herrera Gonzalez put defendant's photograph into a photo lineup. She showed that photo lineup and a second photo lineup to Austin on May 16, 2005. Associates of defendant were in the lineups as well.

Austin crossed out the person in the number two position and circled "unknown" on the first photo lineup, which contained defendant's photograph in the number one position. He also circled "unknown" on the second lineup. Austin indicated that he "didn't want to have anything to do with" the police. When shown the Yukon, Austin said the vehicle was very similar and "could possibly" be the one involved in the shooting, but he was not 100 percent sure.

At some point after the shooting, Duron (Minten's mother) showed Austin a photo of defendant from the newspaper. Austin identified defendant as the driver. However, he did not tell the police about recognizing defendant because he was scared.

In September of 2009, after the police located defendant in South Carolina, Austin met with the police. He told the police that Duron had shown him a photo of defendant and that he had identified defendant as the driver. Duron gave the police a copy of the newspaper, which was dated August 17, 2005. The article accompanying defendant's photograph was titled, "Police search for fugitive." The article stated that the police wanted to talk to defendant regarding the Minten homicide.<sup>5</sup>

#### ***H. Gang Evidence***

Detective Morgan Chappell and Officer Montalbo both testified as gang experts.

##### **1. Testimony About Norteño Gangs**

Detective Chappell described the signs and symbols of the Norteño gang: red, the number 14, the Huelga bird, and the letter N or the pronunciation "ene." He listed some of the Norteño subsets in Watsonville: Northside Chicos (Northside), Watsonville Varrio Norte, Clifford Manor Locos, City Hall Watsonville (City Hall), and Varrio Green Valley. The Watsonville Varrio Norte subset was aligned with Northside. In general, the rules of the Norteño gang prohibit killing other Norteños.

To become a gang member, a person must be jumped in, crimed in, or blessed in. A gang associate is someone who hangs out with gang members but has not yet been

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<sup>5</sup> Austin identified defendant from a photo lineup when he met with the police in September of 2009, but the trial court found that the identification process had been "so suggestive" that the identification was "inherently unreliable," and therefore that the prosecution could not elicit information about that identification at trial. The trial court also ruled that Austin could not make an in-court identification of defendant because his memory of the driver's face was based on the newspaper and lineup photos he had been shown, not from his independent memory of the incident.

jumped in. Gang members adhere closely to a “code of silence,” meaning they will not cooperate with law enforcement, even if a rival gang has attacked a fellow gang member.

Regarding the City Hall subset, the primary activities are robberies, burglaries, shootings, stabbings, gang assaults, and murders. In 2000, City Hall gang member Ismael Farias committed a vehicle burglary. In 2003, City Hall gang member Richard Bettencourt committed a robbery, and he was subsequently convicted of robbery with a gang enhancement.

## **2. Defendant’s Gang Membership**

On May 6, 2005, a week before the Minten/Austin shooting, police went to defendant’s residence to do a probation search and serve an arrest warrant. There was no response when the officers knocked and rang the doorbell, so they entered through a window. They found defendant and four others hiding in the house. The four others included two City Hall gang members (Farias and Emmanuel Rodriguez), one City Hall associate (Dennis Moreno), and one other person (Jaime Rodriguez) whose gang association/membership was unknown. A week before that incident, on April 30, 2005, defendant had been in a vehicle with City Hall gang members Manual Perez and Johnny Martinez. Moreno had committed a vehicle burglary in February of 2004, Perez had committed a robbery in 1997, and Martinez had committed a vehicle theft in 2001.

When defendant was found in his Yukon with a loaded firearm on February 23, 2005, City Hall gang members Valentine Cornejo and Luis Hernandez were passengers. Cornejo committed a vehicle burglary a month later. Hernandez had tattoos indicating his affiliation with the City Hall gang.

On March 3, 2005, an officer driving by a City Hall gang member’s house saw defendant, Cornejo, Hernandez, and Oligario Gonzalez going inside. A probation search of that residence revealed a shell casing in the back yard.

On December 9, 2004, gang members were seen running from a fight. They included defendant, Cornejo, Hernandez, and Rufo Ayala. Defendant had a switchblade in his possession and he challenged an officer to a fight.

On October 9, 2004, police were called to defendant's home in response to a report of shots being fired. Police searched the home. City Hall gang members Moreno, Hernandez, and Guzman were present.

On October 17, 2002, police had been called to a large fight. Defendant was there, and when the police attempted to detain him, he shouted, "[P]uro Norte." Defendant told the police he had been a Norteño since age nine. A search of his bedroom revealed 41 rounds of .22-caliber ammunition.

Another October 2002 police contact with defendant followed a citizen's report of him brandishing a firearm. Defendant had a knife in his pocket when he was searched, and he said he used it for protection from "scraps." Defendant also admitted having a BB gun.

Another police contact with defendant occurred still earlier in 2002. Defendant had been wearing gang attire, and he admitted he was a Norteño.

### **3. The War Between Northside/Watsonville Varrio Norte and City Hall**

On September 24, 2004, Watsonville Varrio Norte gang member Mario Lozano was shot, but not killed. The police suspected Guzman, a City Hall gang member, of committing the shooting. A few months later, in early December of 2004, Guzman was murdered—he was brutally stabbed in broad daylight. The police suspected Lozano of committing the crime, since Lozano was seen running from the scene. However, Lozano was never found.

The night after Guzman's murder, Northside gang member Brian Smith was shot. Ballistics tests indicated that the same gun was used in the Smith and Minten/Austin shootings. Detective Chappell testified that it is common for gangs to have a "hood gun,"

which is owned by the gang and kept at the home of someone who is not on searchable parole or probation.

On June 16, 2005, Officer Montalbo arrested Marco Lopez, a City Hall gang member. In a post-arrest interview, Lopez talked to Officer Montalbo “about the war that was . . . going on” between Northside and City Hall. Officer Montalbo had previously heard, from contacts on the street, that “there was a problem between Northside Watsonville and City Hall Watsonville” because of the Guzman homicide. Lopez, who had been arrested for carrying a gun, said he had armed himself because he was afraid of retaliation by Northside following the Minten shooting. Lopez said he believed Minten was a Northside associate.

Lopez told Officer Montalbo about a gang meeting he had attended shortly after the Minten shooting, and he identified the other gang members at the meeting, which he described as the “junta” of City Hall. Lopez stated that defendant was present at the meeting. Defendant had said “that he had shot and killed Wayne Minten, and not only that had he shot and killed him, but he wanted Marco Lopez to kill the surviving victim [Austin] because he was afraid that [Austin] would testify against him.”

According to Detective Chappell, it is “very, very rare and very, very dangerous” for a gang member to name someone in his own gang as having admitted to a killing. A gang member would not brag about committing a crime that he did not commit, especially since most gang crimes are done with other gang members, so that “if you were lying about it the other people that were there would surely know.”

Detective Chappell also spoke to Lopez, who repeated the information he had provided to Officer Montalbo. Detective Chappell asked Lopez for his thoughts on why defendant had a teardrop tattoo. Lopez said he believed it was because defendant “had done the murder.”

#### **4. Minten's Gang Association/Membership**

Detective Chappell believed that Minten was a Norteño gang member, but he did not know if Minten had been jumped in to a specific subset. Detective Chappell based this opinion on the fact that gang writings had been found in Minten's bedroom; Minten's prior police contacts, during which he wore red clothing; Lopez's statement that Minten was a Northside associate; and Julio Mendez's statement describing Minten's friends. In addition, after Minten's death, a Norteño gang member was caught writing "RIP Wayne" in graffiti, which indicates Minten was a Norteño.

Officer Montalbo had contacts with Minten for a few years before the shooting. He knew that Minten "hung out and associated with members of WVN, Watsonville Varrio Norte, and Northside Watsonville."

#### **5. Detective Chappell's Opinions**

Detective Chappell opined that defendant was an active participant in a criminal street gang on May 13, 2005. He based that opinion on defendant's prior police contacts, gang tattoos, association with other City Hall gang members, and admissions of gang membership. Detective Chappell further opined that defendant knew that City Hall had engaged in a pattern of criminal gang activity. He observed that defendant had committed crimes with other gang members and that defendant was "constantly" associating with gang members who were committing crimes. Additionally, Detective Chappell opined that as of May 13, 2005, defendant had promoted felonious criminal conduct by "the Nortenos and the City Hall Watson criminal street gang." He based that opinion on the fact that defendant had been "shouting it out in the streets to police officers" and "nonverbally" promoting the gang "with his clothing, with his tattoos, with his street fights."

Detective Chappell was asked to assume the following facts: Lozano, a Watsonville Varrio Norte gang member and Northside gang associate, was shot on September 24, 2004. Guzman, a City Hall gang member, was suspected of that shooting.

On December 3, 2004, Guzman was stabbed to death by Lozano. On December 4, 2004, extra police were on patrol because of expected retaliation, and on that date Northside gang member Smith was shot. On May 13, 2005, Northside associate Minten was shot with the same gun used in the Smith shooting. On June 16, 2005, City Hall gang member Lopez was arrested and stated that he was carrying a gun in anticipation that Northside would retaliate for the Minten murder, that Minten was considered a Northside associate, and that City Hall had killed Minten as retaliation for the Guzman murder. Based on that factual scenario, Detective Chappell opined that the Minten murder would benefit the City Hall gang.

## **6. Officer Montalbo's Opinion**

Officer Montalbo testified that he believed the Minten murder was “gang related.” He based his opinion on the fact that, prior to the Minten/Austin shooting, Guzman had been killed by a Northside gang member, and his knowledge of “how these gangs operate”—i.e. that “there would be some type of retaliation from City Hall Watsonville.” In addition, “it was a driveby shooting, which is very consistent with our Norteno gang members.” Further, he had been “making contacts with gang members” around the time of the Minten/Austin shooting, and based on those contacts, he knew “there was a problem between Northside Watsonville and City Hall Watsonville because of the homicide of Isaac Guzman.”

### ***I. Defense Witnesses***

The defense theory was that the police had jumped to the conclusion that defendant was the shooter based on the fact that his car was similar to the burgundy SUV seen by witnesses. The defense argued that the Minten/Austin shooting could not have been committed in retaliation for the Guzman murder because the two incidents occurred six months apart. The defense pointed out that it made more sense to find that the Smith murder, which occurred the day after the Guzman murder, was committed in retaliation for the Guzman murder. The defense also sought to show that Minten had been dealing

drugs and that he was targeted by some gang members—not from the City Hall gang—who wanted Minten to pay “taxes” on his drug sales.

Officer Eddie Santana saw a burgundy SUV in Watsonville on August 16, 2005. The driver looked like defendant. When he called dispatch, he learned that defendant’s car was still impounded. He tried to follow the vehicle, but he lost track of it.

Linda Ramos, Harrington’s mother, testified that about seven days after the Milton/Austin shooting she saw a burgundy SUV at the Stone Creek Apartments, which are located on “[t]he other side of town” from Palm Avenue. She informed the police of the vehicle’s location. Ramos also testified that at Minten’s funeral, people were saying that defendant was bragging about being involved in the homicide.<sup>6</sup>

After the Minten/Austin shooting, Officer Skip Prigge searched a trailer behind Minten’s house. Minten had been living in the trailer along with Ezekiel Rodriguez, also known as Isaac Hernandez. In the trailer, Officer Prigge found notebooks with “pay and owe sheets,” which are typically used by street-level narcotics dealers. The notebooks were found among Minten’s personal belongings, not in the area where Ezekiel Rodriguez was staying.

District Attorney inspector Henry Montes interviewed Austin in April of 2012. Austin said that he had been using methamphetamine and marijuana around the time of the shooting. Austin said that Minten had \$600 to \$1,000 in cash on him at the time of the shooting, as well as an ounce or two of marijuana. Austin described being in a “crew” with Minten, which would “go on missions and go and kick some ass and represent.”

Several witnesses testified about an incident on January 10, 2005, in which Minten was found injured at a trailer park. Marijuana was on the ground near Minten, and

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<sup>6</sup> Defendant elicited this testimony to show that “gossip” about defendant’s involvement had resulted from the police targeting defendant as their suspect.

Minten had \$306 in cash on him. A white truck was seen leaving the area at a high rate of speed.

Michael Harrington, one of Minten's best friends, testified that he and Minten sold drugs at the time of the Minten/Austin shooting. This drew the attention of some gangs, including Northside and Landis. At some point prior to the Minten/Austin shooting, some members of the Landis gang had come to Harrington's house. Northside gang member Isaac Valdavia was with the Landis gang members. The gang members had a hostile attitude and wanted drugs from Harrington and Minten. Minten gave the gang members "a 40" of methamphetamine. Harrington assumed that the gang members wanted the drugs "as sort of a tax." Like Austin, Harrington described being in a "crew" with Minten. According to Harrington, their crew had Norteño ties but was not associated with a specific subset. Minten tended to associate with Northside, Varrio Green Valley, Watsonville Varrio Norte, and Clifford Manor Locos, and he considered City Hall an enemy.

Minten's friend Timothy Ochoa testified that Minten had been concerned about being killed by gang members who wanted him to pay rent or taxes for selling drugs. Minten said that Valdivia would be "the snitch" responsible for his death—i.e., that Valdivia would have reported Minten to the higher-ups.

The defense presented its own gang expert, private investigator and former law enforcement officer Glenn Rouse. His testimony about the history, symbols, and rules of Norteño gangs was similar to the testimony of Detective Chappell. Rouse testified that a Norteño gang member who commits a violent act on another Norteño without authority from a high-ranking Norteño is subject to discipline, including death. He also testified that a teardrop tattoo originally meant that "you had killed somebody," but that it now could mean that you had spent time in prison or that you had lost a family member or fellow gang member. Non-gang members sometimes get teardrop tattoos to look tough.

Rouse testified that gangs use violence to get money from drug dealers in their areas, whether or not those drug dealers are gang members.

The defense also presented evidence that Minten had accused Bryan Jones of stealing \$6,000 from him in November of 2004. After Minten came looking for Jones, the Jones's vehicle was burned in an arson incident.

The defense sought to discredit Marco Lopez's statements. The defense introduced evidence that Lopez had been in and out of custody prior to his arrest in June of 2005 and suggested that, at the time of his interview, Lopez was seeking to parlay information about the Minten/Austin shooting into benefits for himself. Officer Montalbo acknowledged that Lopez was a heroin addict and that Officer Montalbo had initiated the topic of the war between City Hall and Northside. Officer Montalbo also acknowledged that he had suggested Lopez say that he was carrying a gun because Northside or City Hall was after him. Officer Montalbo had offered to contact the District Attorney to try to help Lopez "work something out." Officer Montalbo told Lopez that if he went to prison for a long time, he would not be able to see his baby or his girlfriend. Lopez said that defendant had committed the Minten/Austin shooting only after Officer Montalbo made these statements.

#### ***J. Charges, Verdicts, and Sentence***

Defendant was charged with the murder of Minten (§ 187, subd. (a); count 1), the attempted murder of Austin (§§ 664/187, subd. (a); count 2), and participation in a criminal street gang (§ 186.22, subd. (a); count 3). As to counts 1 and 2, the information alleged that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and that a principal used and personally and intentionally discharged a firearm that caused great bodily injury or death (§ 12022.53, subds. (b)-(d), (e)(1)).

The jury convicted defendant of all three counts. The jury found that the murder was premeditated and deliberate first degree murder. The jury found that both the

murder and attempted murder were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) As to both the murder and attempted murder, the jury found that a principal personally and intentionally discharged a firearm that caused great bodily injury or death (§ 12022.53, subds. (d), (e)(1)), and further found that defendant himself personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (b), (e)(1))<sup>7</sup>.

The trial court sentenced defendant to a prison term of 94 years 8 months to life: 25 years to life for the murder (§ 187, subd. (a), with a consecutive term of 25 years to life for discharging a firearm (§ 12022.53, subd. (d)); nine years for the attempted murder (§ 664/187, subd. (a)), with a consecutive term of 25 years to life for discharging a firearm (§ 12022.53, subd. (d)) and a consecutive term of 10 years for the gang enhancement (§ 186.22, subd. (b)); and a consecutive term of eight months for the substantive gang offense (§ 186.22, subd. (a)).

### **III. DISCUSSION**

Defendant contends the trial court erred by permitting the gang experts to testify that Lopez said (1) defendant had admitted that he was the shooter and (2) that the Minten/Austin shooting was part of a gang war. Defendant claims the gang expert testimony violated his Sixth Amendment right of confrontation as well as state evidentiary rules, including Evidence Code section 352.

#### **A. Motion in Limine**

Defendant filed a motion in limine to exclude and limit gang evidence. Defendant argued that expert opinion about gangs should be limited to material that would help the jury understand the significance of certain evidence, “not to fill in factual gaps.” Defendant noted that gang evidence is “extremely prejudicial” and sought exclusion of

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<sup>7</sup> As to this finding, the verdict forms contain the language of section 12022.53, subdivision (d) but reference section 12022.53, subdivisions (b) and (e)(1).

specific evidence pursuant to Evidence Code section 352, including testimony that the Minten murder was an “intra-gang retaliation hit.”

At the April 30, 2012 hearing on motions in limine, the trial court indicated it would not allow the gang experts to testify that defendant had committed the shooting, but that they could opine that the shooting was committed for the benefit of a criminal street gang. The court indicated it understood that defendant did not want the experts to testify that the shooting was “an intra-gang hit” without “underlying evidence concerning those facts.”

The prosecutor brought up Lopez’s statement about defendant admitting that he had killed Minten. The prosecutor argued that the gang experts could rely on Lopez’s statement, asserting that Lopez’s statement was reliable because it came from a fellow gang member.

During the continued motion in limine hearing the following day, defendant brought up the question of whether Lopez’s statement could come in through the gang experts. Defendant pointed out that Lopez had refused to testify at the preliminary hearing. He objected to the use of Lopez’s statement as the basis for an expert opinion unless Lopez testified at trial. The trial court indicated it understood that defendant did not want the jury to hear about “an admission that’s hearsay from a witness that’s not available for you to cross-examine.”

The prosecutor argued that the gang experts could properly rely on out-of-court statements in rendering their opinions, and that the defense could show that the out-of-court statements were not credible evidence. The prosecutor nevertheless indicated he would not introduce Lopez’s statement about defendant’s admission to the Minten murder without further briefing and discussion.

The trial court ordered the prosecutor not to mention Lopez’s statement or elicit it from a witness “without prior authority from the Court.” The trial court noted it would

be “very difficult to have the jury consider it only for the purpose of evaluating the basis of the expert’s opinion as opposed to considering it as an admission.”

## **B. Trial Discussions**

During trial, the prosecutor informed the trial court that Lopez had indicated he would not testify. The prosecutor nevertheless wanted to bring Lopez in to be questioned in front of the jury. The prosecutor wanted to ask Lopez about statements he made that would be used as the basis for expert opinion, including (1) statements about there being “bad blood” between City Hall and Northside, and (2) defendant’s admission about committing the Minten murder. The trial court indicated it would hold an Evidence Code section 402 hearing before permitting Lopez to be questioned in front of the jury if he was unwilling to testify.

Later in the trial, defendant raised the issue of whether the gang experts could testify that the Minten/Austin shooting was done in retaliation for the Guzman shooting. The trial court initially ruled that Lopez’s statements to that effect could not come in if Lopez did not testify “because it’s unduly prejudicial.” The trial court noted that the issue was “principally controlled by a[n Evidence Code section] 352 analysis.”

The prosecutor explained that he wanted Officer Montalbo to testify that the “word on the street” was that Guzman, a City Hall gang member, had been killed by members of the Northside subset; that Minten, a Northside associate, had been killed in retaliation for the Guzman killing; and that Lopez, a City Hall member, claimed he carried a gun because he feared retaliation from Northside. Defendant argued that such evidence was not the proper subject of expert opinion testimony.

The trial court ruled that Officer Montalbo could testify about the gang affiliations of individuals including Minten and Guzman. Officer Montalbo could also testify about the date of the Guzman murder and law enforcement’s theory about who killed him. Additionally, the trial court would allow Officer Montalbo to give opinions “based upon the hearsay statement of Marco Lopez that when he’s arrested with a gun, he’s carrying a

gun, he's a City Hall member, he's carrying a gun because he's concerned about retaliation from Northside because of the Minten murder."

Defendant objected. Defendant complained that he would have no opportunity to cross-examine Lopez, "the source of this information."

The trial court ruled that Officer Montalbo was "definitely not going to be permitted to testify that Marco Lopez told him or any other law enforcement agent" that defendant "admitted to the killing." Officer Montalbo would only be permitted to testify about "what gang Lopez was affiliated with and that Lopez told him he was carrying the gun because the word among City Hall and the gangs in the streets was that as a City Hall member he could expect a retaliation for the Minten killing because the inference there is that the Minten killing was conducted by a City Hall gang member." The trial court reiterated that Officer Montalbo could give an opinion as to Guzman's gang affiliation and an opinion as to the identity and gang affiliation of the person suspected in Guzman's murder. The court indicated it could instruct the jury to disregard evidence that had inadequate foundation or was not sufficiently reliable.

### **C. Officer Montalbo's Trial Testimony**

Following the above discussion, Officer Montalbo testified that in June of 2005, he had contact with Lopez, who had been carrying a firearm. Lopez told Officer Montalbo that "he was carrying the gun because he was a City Hall gang member and he was in fear of retaliation from Northside Watsonville" because of the Minten homicide. Lopez said "the killing of Wayne Minten was a direct result of retribution for the killing of Isaac Guzman." Defendant's objections to this testimony were overruled.

Officer Montalbo went on to testify that he had "dealt with" Lopez for several years and knew Lopez to be a member of City Hall. According to Officer Montalbo, Lopez faced potential consequences for sharing information with the police: he would be labeled as a snitch, and he would become a "target for violence" by his own gang and other Norteño gang members.

Officer Montalbo opined that the Minten/Austin shooting was gang related. He based his opinion on “the retaliation issue between the two gangs,” as well as information he had gathered “on the street day in and day out,” the fact that it was a drive-by shooting, and the fact that Minten was a Northside associate.

**D. Lopez’s Refusal to Testify**

Later in the trial, Lopez was brought in to court. Although he had been offered immunity, he refused to take the oath, accept the immunity offer, or answer any questions. He was advised he would be in contempt of court, but he still refused to testify.

The trial court made further rulings on the scope of gang expert testimony following Lopez’s refusal to testify, reiterating that Detective Chappell could testify that Lopez said that he carried a gun after the Minten/Austin shooting because he expected retaliation.

Defendant objected to any such testimony about Lopez’s statements, since he would not be able to cross-examine Lopez. Defendant further objected that Detective Chappell was being permitted to introduce the very facts his opinion was based on, not facts “rooted in” the evidence.

Prior to the testimony of Detective Chappell, the trial court held a further hearing on the scope of his expert testimony. The parties discussed whether Detective Chappell should be permitted to give the opinion that Minten was an associate or member of the Northside gang. The prosecutor referenced Lopez’s statements to Officer Montalbo about the Minten homicide being part of a “war” between Northside and City Hall, and he argued that this statement was the proper basis for an opinion about Minten’s gang association. The trial court reiterated that it was denying the defense motion to exclude expert opinion about the motive for the Minten homicide.

### **E. Detective Chappell's Trial Testimony**

On direct examination, Detective Chappell testified about the Lozano shooting, the Guzman murder, and Lopez's arrest in June of 2005. Detective Chappell testified that Lopez told the police about "the war" between City Hall and Northside and about a gang leaders' meeting held shortly after the Minten/Austin shooting, which included defendant. Detective Chappell testified that it was rare for a gang member to provide this kind of information, a fact that was significant to Lopez's reliability.

Detective Chappell then rendered his opinions about defendant's active participation in a criminal street gang, defendant's knowledge that City Hall gang members had engaged in a pattern of criminal gang activity, and defendant's promotion of the City Hall gang. After hearing a hypothetical set of facts that included Lopez's statements, Detective Chappell also rendered his opinion that the Minten murder would benefit the City Hall gang.

During cross-examination, defendant sought to have Detective Chappell acknowledge that Lopez was not credible. Defendant asked Detective Chappell if he was aware of certain incidents in Lopez's criminal history and evidence that Lopez was a heroin addict. Defendant suggested Lopez's credibility was diminished by his fear of going to prison for the gun charge. In response, Detective Chappell explained that what "pull[ed] the most weight" in terms of Lopez's credibility was the fact that he had named people in his own gang, including defendant.

Prior to the prosecution's redirect examination of Detective Chappell, the prosecutor argued that the defense had "open[ed] the door" to the introduction of more details about Lopez's statement by conducting a detailed cross-examination of Detective Chappell regarding Lopez's prior criminality and drug addiction. The prosecutor argued that he should be able to introduce the fact that Lopez told the police that defendant had bragged about killing Minten. The prosecutor argued that this would "completely put

Marco Lopez's credibility at issue" and explain why Detective Chappell would believe Lopez.

The trial court observed that cross-examination had "left the jury with the impression that Detective Chappell is acting unreasonably or his opinion is unreliable because he has taken the word of Marco Lopez . . . ." The trial court indicated it thought that Lopez's identification of defendant as the shooter was "an important piece as to why Marco Lopez's statement is believable . . . ."

Defendant argued that he had not "opened the door." Defendant also observed that admitting Lopez's statement through a gang expert would present "confrontation issues."

The trial court ruled that it would "reluctantly" allow the prosecution to elicit Lopez's statement about defendant's admission to the Minten shooting, and that it would give "a strong admonition" to the jury.

On redirect examination, Detective Chappell explained that he had personally spoken to Lopez, and that Lopez had affirmed all the statements he had previously made to Officer Montalbo. Detective Chappell affirmed that the details Lopez had provided gave his statement credibility. The prosecutor then asked, "What other . . . things did Marco Lopez tell you and also Sergeant Montalbo back in June of 2005 that you considered in terms of your opinion as to the reliability of that statement in reaching your opinion?" Detective Chappell replied, "He said that [defendant] told him at that . . . gang meeting that he had shot and killed Wayne Minten, and not only that had he shot and killed him, but he wanted Marco Lopez to kill the surviving victim because he was afraid that he would testify against him."

Detective Chappell testified that it was "very, very rare and very, very dangerous" for a gang member to name someone in his own gang as having admitted to a killing. He anticipated that "attempts will be made on Marco Lopez's life after this."

Defendant later called Officer Montalbo and asked questions aimed at demonstrating that Lopez's statement was not reliable. Defendant elicited Officer Montalbo's testimony that Lopez was a heroin addict and that Officer Montalbo had offered to help Lopez in exchange for information.

**F. Jury Admonitions**

After Officer Montalbo testified that Lopez said he was carrying a gun because he was a City Hall gang member and feared retaliation from Northside, the trial court instructed the jury: "[B]ecause Mr. Lopez is not here under oath to be cross-examined, you have no way to evaluate the truth or accuracy of that statement. So I'm permitting you to hear this testimony, which is hearsay and would not otherwise be admissible, only to evaluate this witness's opinion, the information he's relying [on] to render an opinion. So do not consider Mr. Lopez's statement for the truth of the matter asserted. The only use of this [is] to evaluate the reliability of this witness's opinion."

Following Officer Montalbo's opinion testimony about the Minten/Austin shooting being gang-related and done in retaliation for the Guzman killing, the trial court admonished the jury again. The trial court first told the jury that in evaluating the expert testimony, it should consider "any facts or information on which the expert[] relies and reaches any opinion. You have to decide whether the information on which the expert relies is true and accurate." The trial court then told the jury that as to Lopez's hearsay statements, "you cannot consider those statements for the truth because he's not here to be cross-examined. You can only consider those as it relates to you evaluating the reliability of [Officer] Montalbo's opinion testimony."

In the middle of Detective Chappell's testimony on cross-examination, the trial court admonished the jury: "And I do want to remind you . . . with respect to the testimony that this witness [has] been permitted to give about statements that are contained in police reports that he has reviewed, you're not to consider the statements for the truth of the matter asserted. [¶] In other words, anything Marco Lopez said to

Officer Montalbo in Officer Montalbo's report contains his statements [*sic*], you can't consider those statements for the truth of the matter asserted. You can only consider those statements in evaluating the reliability of Detective Chappell's expert opinion, whether it's appropriate for this expert to rely on those statements, because we are talking about multiple levels of hearsay. [¶] Marco Lopez isn't here to be cross-examined under oath, and so don't rely -- don't use the statements of Marco Lopez for the truth of the matter contained in the statements, namely that Wayne Minten was perceived to be a member or an associate of a criminal street gang or the Northside gang or any other subject matters contained in those statements. [¶] You are only permitted to hear about this to evaluate whether the expert's opinion is reliable. . . ."

The trial court then read an instruction based on CALCRIM No. 332: "A witness or witnesses are allowed to testify as experts and to give an opinion if they are qualified. And this expert is qualified as an expert on gang issues. You must consider the opinions, but are not required to accept them as true or correct. The meaning and importance of any opinions are for you to decide. [¶] In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. . . . [¶] In addition, consider the expert's knowledge, skill, experience, training and education, the reason the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. [¶] You must decide whether . . . information [on] which the expert relied is true and accurate. You may disregard any opinion that you find unbelievable, unreasonable or unsupported by the evidence. . . ."

The trial court also admonished the jury immediately after Detective Chappell testified that, according to Lopez, defendant admitted committing the Minten shooting: "You may not consider what you've just heard for its truth. In other words, Marco Lopez is not here to be cross-examined, so you may not consider the statement that he allegedly made about what [defendant] said to him for the truth of that matter. [¶] You can only consider it as to why Detective Chappell was relying on his statement in rendering the

opinions that he rendered today, and Detective Chappell was rendering his opinions only as it relates to the charge as to whether or not [defendant] is a gang member, an active participant in a criminal street gang, and also whether the particular crime was allegedly committed . . . for the benefit of the criminal street gang. [¶] That's why his opinions have been admitted. So I'm permitting you to hear this testimony only to evaluate whether it's reasonable for Detective Chappell to rely on Marco Lopez's statement in rendering the opinions he's rendered. [¶] You may not consider Marco Lopez's statement for the truth that [defendant] said these things to him. In other words, there is no admission here that you can consider as to the homicide charge or whether [defendant] committed this offense. It's up to you to evaluate whether Detective Chappell is reasonable in relying on the statement of Mr. Lopez in rendering his opinions, and that is the reason you are hearing this testimony."

The trial court gave the jury yet another admonition when it recessed for the day in the middle of Detective Chappell's redirect examination. The court reiterated that it had allowed testimony about Marco Lopez's statement only for "limited purposes." The court instructed the jury: "[W]hen you start your deliberations you may not go back into the jury room and say, well, [defendant] has made an admission in this case. He's confessed to the crime. [¶] You may not consider what Marco Lopez said to Officer Montalbo for its truth, because you have no way of evaluating Marco Lopez's credibility, because he is not here being subject to cross-examination. [¶] It would be entirely different if Marco Lopez came into the courtroom, raised his right arm and took an oath an[d] was subjected to direct examination and cross-examination and testified in front of you under oath after he had been cross-examined, that [defendant] said to him I committed this murder. [¶] You have no evidence that that statement is true, and you may not consider it. You may not discuss it in the deliberation room in evaluating whether or not [defendant] is guilty or not guilty of the offense of murder. [¶] This witness has been called to render an opinion on the one substantive charge as to whether

or not [defendant] is an active participant in a criminal street gang. There are various elements to that offense, and he's rendered opinions on that as to whether or not the crime that is alleged to have been committed in this case was committed for the benefit of a criminal street gang, and that's the sole reason for this witness'[s] appearance in this case." The trial court then discussed Detective Chappell's testimony about defendant's teardrop tattoo, explaining that Detective Chappell had personal knowledge of the tattoo and that the jury could determine whether the tattoo constituted a "nonverbal admission." The trial court then again reminded the jury, "[Y]ou may not go into the jury room and say that [defendant] has admitted the commission of a murder to Mr. Marco Lopez, because Mr. Lopez is not here to be cross-examined. [¶] Only evaluate that statement for the purposes of determining whether Detective Chappell's opinions are reasonable and reliable."

After Officer Montalbo testified as a defense witness, the trial court gave another jury admonition: "I do want to remind you that the testimony you've just heard about the contents of Marco Lopez's statement to this officer is hearsay, so nothing that Marco Lopez [said] is to be considered [by] you for the truth of the matter about what he was talking about. I permitted you to hear about it so you could discuss[] the reliability and believability of Detective Chappell's testimony with respect[] to whether it was reasonable or appropriate for him to rely on Marco Lopez's statements and to use Marco Lopez's statement as it was detailed in the officer's report concerning his opinions about gang member[s], and whether the alleged crime was committed for the benefit of a criminal street gang."

In the pre-deliberation instructions, the trial court gave the jury further admonitions related to the Lopez statement. The jury was reminded that "certain evidence was admitted for a limited purpose" and that the jurors could "consider that evidence only for that purpose and for no other purpose." (See CALCRIM No. 303.) The jury was instructed on how to consider expert witness testimony, and that in

determining the believability of an expert witness, it could consider “the facts or information on which the expert relied” after deciding “whether the information on which the expert relied was true and accurate.” (See CALCRIM No. 332.) The trial court also read a special instruction, which provided: “Morgan Chappell testified that in reaching his conclusions as an expert witness, he considered statements made by Marco Lopez. You may consider those statements only to evaluate the expert’s opinion. Do not consider those statements as proof that the information contained in the statements is true.”

### **G. Motion for a New Trial**

After the jury reached its verdicts, defendant moved for a new trial on a number of grounds. Defendant argued that the trial court erred by admitting testimony about Lopez’s statements.

At the October 2, 2012 sentencing hearing, the trial court denied the motion for a new trial. The trial court rejected defendant’s claim that the court should not have allowed Detective Chappell to testify that, according to Lopez, defendant had admitted being the shooter. The court explained, “[G]iven the nature of the cross-examination of [Detective] Chappell it was necessary for the jury to have that testimony so that the jury could adequately evaluate the believability and reliability of Detective Chappell’s testimony.”

### **H. Analysis**

Defendant contends that the trial court erred by admitting Lopez’s statements through the testimony of the gang experts (Officer Montalbo and Detective Chappell). He argues that the Sixth Amendment’s Confrontation Clause prohibits expert witnesses from relaying testimonial hearsay to the jury, even if the underlying out-of-court statements are not offered for their truth.

In our original opinion in this case, we found that as an intermediate court, we were required to follow the California Supreme Court’s holding in *People v. Gardeley*

(1996) 14 Cal.4th 605 (*Gardeley*) that “basis evidence” for a gang expert’s opinion is not offered as “ ‘independent proof’ of any fact.” (*Id.* at p. 619.) We noted that no United States or California Supreme Court case had yet held that testimony regarding the basis for an expert’s opinion, which was *not* admitted for its truth at trial, must nevertheless be regarded as admitted for its truth for purposes of the Sixth Amendment’s right of confrontation even when a limiting instruction is given. Thus, we concluded that the admission of Lopez’s statements through the testimony of the gang experts, with repeated admonitions that the jury not consider those statements for the truth, did not violate the Sixth Amendment.

In *Sanchez, supra*, 63 Cal.4th 665, the California Supreme Court held that “case-specific statements” related by a gang expert constituted inadmissible hearsay and that admission of some of the statements constituted “testimonial” hearsay under the Sixth Amendment. (*Sanchez, supra*, at pp. 670-671; see *Crawford v. Washington* (2004) 541 U.S. 36, 68 [testimonial hearsay is inadmissible unless the witness is unavailable or there was a prior opportunity for cross-examination].) The court explained that “[c]ase-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried” and are distinguished from “generally accepted background information.” (*Sanchez, supra*, at p. 676.) The court disapproved its prior opinion in *Gardeley, supra*, 14 Cal.4th 605, “to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules.” (*Sanchez, supra*, at p. 686, fn. 13.)

In supplemental briefing submitted after the California Supreme Court transferred this matter to us for reconsideration in light of *Sanchez*, the Attorney General now concedes that the admission of Lopez’s statements through the testimony of the gang experts, despite the repeated admonitions that the jury not consider those statements for the truth, violated the Sixth Amendment. However, the Attorney General asserts that the error was harmless beyond a reasonable doubt. (See *Chapman, supra*, 386 U.S. at p. 24.)

In our original opinion in this case, we found that the trial court’s admission of Lopez’s statements was error under Evidence Code section 352, and we conducted a harmless error review under the standard for state law error. (See *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).) Under that standard, an error requires reversal “only when the court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Id.* at p. 836.)

In our original opinion’s prejudice analysis under *Watson*, we found that the record contained very strong evidence that defendant was the driver, if not the actual shooter. First, there was very little question that defendant’s car—a burgundy Yukon—was the vehicle from which the shooting occurred and that defendant was driving it at the time of the shooting, based on witness descriptions and the fact that gunshot residue was found inside the vehicle. Second, other evidence indicated defendant was the driver and/or the shooter: the receipt for ammunition found in defendant’s bedroom,<sup>8</sup> defendant’s flight out of state, and the fact that defendant had gotten a teardrop tattoo after the shooting. Third, there was strong evidence of defendant’s membership in the City Hall gang and evidence that Minten was aware he was a target of City Hall prior to the shooting. Finally, Austin had made a reliable and admissible identification of defendant as the driver and the shooter. After reviewing this evidence, we concluded the jury may not have found defendant was the actual shooter if it had not heard evidence of Lopez’s statements, and thus that it was reasonably probable that the jury would not have returned true findings on the allegations that defendant himself personally and intentionally discharged a firearm causing great bodily injury or death. (See *Watson*, *supra*, 46 Cal.2d at p. 836.) However, as to the substantive offenses, the gang

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<sup>8</sup> In his supplemental brief, defendant notes that the caliber of bullet found at the scene did not match the caliber of bullets on the receipt.

allegations, and the allegations that a principal personally and intentionally discharged a firearm causing great bodily injury or death, we found the error harmless under *Watson*. We therefore modified the judgment to strike the jury’s findings that defendant personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d), (e)(1)) and stayed the term for the criminal street gang allegation (§ 186.22, subd. (b)(1)).

The Attorney General asserts that the same analysis of the evidence should result in a finding that the Sixth Amendment error was harmless beyond a reasonable doubt under *Chapman*. The *Chapman* standard of review, however, requires “the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (*Chapman, supra*, 386 U.S. at p. 24.) Reversal is required under *Chapman* if there is a “ ‘reasonable possibility that the evidence complained of might have contributed to the conviction.’ ” (*Id.* at p. 23; see also *Yates v. Evatt* (1991) 500 U.S. 391, 403 (*Yates*), disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) “To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. Thus, to say that [the error] did not contribute to the verdict is to make a judgment about the significance of the [error] to reasonable jurors, when measured against the other evidence considered by those jurors independently of the [error].” (*Yates, supra*, at pp. 403-404.) The inquiry under *Chapman* is “not whether, in a trial that occurred without the error, a guilty verdict would *surely* have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.” (*Sullivan, supra*, 508 U.S. at p. 279, first italics added.)

In performing our harmless error analysis under *Chapman*, we are mindful of the fact that “ ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him,’ ” because “ ‘[t]he admissions of a defendant

come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.’ ” (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296 (*Fulminante*)). “[C]onfessions, ‘as a class,’ ‘[a]lmost invariably’ will provide persuasive evidence of a defendant’s guilt [citation]” and “often operate ‘as a kind of evidentiary bombshell which shatters the defense’ [citation].” (*People v. Cahill* (1993) 5 Cal.4th 478, 503 (*Cahill*)). Therefore, “the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence.” (*Ibid.*)

In this case, defendant’s confession to Lopez was admitted twice, through the testimony of both Officer Montalbo and Detective Chappell. Not only did the jury hear that defendant admitted being the shooter, but the jury heard that defendant said he wanted Lopez to kill Austin, in order to keep Austin from testifying. The jury also heard Lopez’s statement that he believed defendant had obtained the teardrop tattoo because defendant had committed the Minten murder. The credibility of Lopez’s account about defendant’s confession was bolstered by Detective Chappell’s testimony that it is “very, very rare and very, very dangerous” for a gang member to name someone in his own gang as having admitted to a killing and that a gang member would not brag about committing a crime that he did not commit. Thus, the evidence of defendant’s confession was likely to be considered by the jury as “persuasive evidence of . . . defendant’s guilt.” (*Cahill, supra*, 5 Cal.4th at p. 503.)

In *Cahill*, the Supreme Court noted that the erroneous admission of a confession “might be found harmless, for example, (1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime. . . .” (*Cahill, supra*, 5 Cal.4th at p. 505; see also *People v. Neal* (2003) 31 Cal.4th 63, 87 (*Neal*)).

None of the circumstances identified in *Cahill*, and no analogous circumstances, exist in this case. Here, most of the evidence linking defendant to the murder was circumstantial. (See *People v. Quartermain* (1997) 16 Cal.4th 600, 621.) The only direct evidence of defendant's involvement (other than his admission to Lopez) was the identification made by Austin after Duron showed him defendant's photo. However, under a *Chapman* analysis, we cannot say that Austin's identification of defendant, while reliable, was so strong as to overcome the prejudicial effect of admitting defendant's admission to committing the murder, since Austin had initially failed to identify defendant in a photographic lineup and had initially named others—Michael Harrington and a person named Gabe—as possibly being involved in the shooting.

Additionally, “when measured against the other evidence considered” by the jury, defendant's admission was significant. (*Yates, supra*, 500 U.S. at p. 404.) The defense presented evidence that may have raised a reasonable doubt about defendant's involvement in the murder in the mind of one or more jurors, had the jury not heard about defendant's admission to Lopez. For instance, there was evidence that a police officer saw another burgundy SUV in Watsonville a few months after the murder, with a driver who looked like defendant. There was also evidence that other gang members had a motive to shoot Minten, who had been selling drugs without paying gang “taxes.” And, the admission of Lopez's statements apparently led the defense to pursue a risky trial strategy: in order to show that “gossip” about defendant's involvement had resulted from the police targeting defendant as their suspect, the defense elicited evidence that, at Minten's funeral, people were saying that defendant was bragging about being involved in the homicide. (See *Neal, supra*, 31 Cal.4th at p. 87.)

In sum, although there was very strong evidence that defendant was either the shooter or an aider and abettor to the Minten murder, we conclude the error in admitting Lopez's statement was not harmless beyond a reasonable doubt (*Chapman, supra*, 386 U.S. at p. 24) as to the substantive offenses, the gang allegation, and the allegations that

defendant or a principal personally and intentionally discharged a firearm that caused great bodily injury or death. After a careful review of the record, and in light of the “damaging” nature of the erroneously admitted evidence (see *Fulminante, supra*, 499 U.S. at p. 296), we find there is a “ ‘reasonable possibility that the evidence complained of might have contributed to the conviction.’ ” (*Chapman, supra*, at p. 23.) On this record, we cannot find that “the guilty verdict actually rendered in *this* trial was surely unattributable to the error.” (*Sullivan, supra*, 508 U.S. at p. 279.) We will therefore reverse the judgment.

#### **IV. DISPOSITION**

The judgment is reversed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

***People v. Rosas***  
**H038879**